

United States
Circuit Court of Appeals

For the Ninth Circuit.

NAT ROGAN, Collector of Internal Revenue for
the Sixth Internal Revenue Collection District
of California,

Appellant,

vs.

THE STARR PIANO COMPANY, PACIFIC
DIVISION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

APR 1 - 1943

PAUL F. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	16
Appeal:	
Certificate of Clerk to Transcript of Record on	50
Designation of Contents of Record on (DC)	47
Designation of Parts of Record Deemed Necessary for Consideration on (CCA)	54
Notice of	46
Orders Extending Time to Docket.....	49, 50
Statement of Points on Which Appellant Intends to Rely on (CCA).....	52
Certificate of Clerk to Transcript of Record on Appeal	50
Complaint for Recovery of Income and Excess Profits Taxes	2
Exhibit A—Claim for Refund, August 18, 1939	10
Decision, Memorandum	41

Designation of Contents of Record on Appeal (DC)	47
Affidavit of Service.....	48
Designation of Parts of Record Deemed Nec- essary for Consideration on Appeal (CCA)...	54
Findings of Fact and Conclusions of Law.....	43
Judgment	45
Minute Order and Memorandum Decision....	41
Names and Addresses of Attorneys of Record	1
Notice of Appeal.....	46
Orders Extending Time to Docket Appeal...49, 50	
Statement of Points on Which Appellant In- tends to Rely (CCA)	52
Stipulation of Facts.....	19
Exhibit A—Merger Agreement, July 31, 1934, by and Between Starr Piano Com- pany and Gennett Realty Company.....	27
Exhibit B—Certificate of Starr Piano Company	34
Exhibit C—Certificate of Gennett Realty Company	37

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LEO V. SILVERSTEIN, ESQ.,

United States Attorney.

EDWARD J. O'CONNOR, ESQ.,

Assistant United States Attorney,

600 U. S. Post Office and Court House

Bldg.,

Los Angeles, Calif.

For Appellee:

CLAUDE I. PARKER and

JOHN B. MILLIKEN, ESQS.,

808 Bank of America Bldg.,

Los Angeles, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California

No. 1459-O.C.

THE STARR PIANO COMPANY, PACIFIC DIVISION, a corporation,

Plaintiff,

vs.

NAT ROGAN, Collector of Internal Revenue for
the Sixth Internal Revenue Collection District
of California,

Defendant.

COMPLAINT FOR THE RECOVERY OF IN-
COME AND EXCESS PROFITS TAXES
ILLEGALLY ASSESSED AND COL-
LECTED.

Comes now the plaintiff, complains of the defendant and for cause of action alleges:

I.

That at all times herein mentioned plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business located in the County of Los Angeles, in said State of California.

II.

That at all times from and after July 1, 1935 defendant has been and now is the duly appointed, qualified and acting Collector of Internal Revenue

for the Sixth Internal Revenue Collection District of California. That defendant is the person to whom the sums herein sought to be recovered were paid, as hereinafter set forth. That at all times herein mentioned, defendant was and still is a resident of the County of Los Angeles and of the Southern District of California, Central Division.

III.

That this is an action for the recovery of Federal income [2] and excess-profits taxes and interest for the calendar year 1934 erroneously and illegally assessed and collected from plaintiff in the amount of \$73,557.08. a
B

IV.

That on or about April 15, 1935 pursuant to extension of time to file return granted by defendant, plaintiff caused to be made and filed its federal income and excess-profits tax return for the calendar year ended December 31, 1934. That said return disclosed a net income subject to tax for said calendar year in the sum of \$647.24 and a federal income tax due in the sum of \$89.00. That said return disclosed no liability for excess profits tax on the part of plaintiff for said year. That said tax liability in the amount of \$89.00 together with interest in the amount of \$.11 to cover the late payment of the first installment of tax was paid at the following times and in the following amounts: \$22.36 on April 15, 1935; \$22.25 on June 15, 1935; A
allege

\$22.25 on September 16, 1935 and \$22.25 on December 16, 1935.

V.

That thereafter the Commissioner of Internal Revenue through his agents caused said income and excess-profits tax return of plaintiff for the calendar year 1934 to be audited. That as a result of said audit there was proposed and assessed against plaintiff a deficiency in income tax for said calendar year in the amount of \$46,240.78 and a deficiency in excess profits tax for said year in the amount of \$16,222.19. That plaintiff paid to defendant said deficiencies in income and excess-profits tax together with interest in the amount of \$11,094.11 or a total sum of \$73,557.08 on March 3, 1938.

VI.

That the true and correct net income of plaintiff for [3] said calendar year 1934 did not exceed the sum of \$674.24 reported by plaintiff on its income tax return for said year as aforesaid. That plaintiff's true and correct income tax liability for said calendar year 1934 did not exceed \$89.00 paid by plaintiff as aforesaid. That all sums in excess of said sum of \$89.00 assessed and collected from plaintiff as and for income taxes for said calendar year 1934 and all sums assessed and collected from plaintiff as and for excess-profits tax for said year and all sums in excess of \$.11 collected as interest on account of late payment of tax, as aforesaid, were erroneously and illegally assessed upon and collected from plaintiff by defendant as and

for federal income and excess-profits taxes and interest for said calendar year 1934 and in that regard plaintiff alleges:

VII.

That prior to 1922 plaintiff acquired certain long-term leases in the City of Los Angeles. That during the year 1922 plaintiff caused Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California. That said Gennett Realty Company was incorporated by plaintiff for the mere purpose of holding title to the long-term leases aforesaid. That immediately after the incorporation of said Gennett Realty Company, plaintiff transferred said leases to it in exchange for all of the capital stock of said company except for directors' qualifying shares and that plaintiff did at all times during the existence of said Gennett Realty Company own all the shares of said Gennett Realty Company except said qualifying shares. That the property covered by said long-term leases aforesaid was subleased to plaintiff by said Gennett Realty Company and, thereafter, plaintiff and Gennett Realty Company joined in a sublease of said leases to a third party. [4] That the officers and directors of plaintiff were also officers and directors of Gennett Realty Company. That Gennett Realty Company maintained no separate business offices and hired no separate employees and its business affairs were conducted in the office of plaintiff by officers and employees of plaintiff. That the affairs of Gennett Realty

Company were directed and controlled by plaintiff and that said company was operated as a department of plaintiff. That in 1934 plaintiff and Gennett Realty Company entered into a merger agreement pursuant to and in accordance with Sections 361 to 362(c) inclusive of the Civil Code of the State of California and said Gennett Realty Company was merged into plaintiff pursuant to the aforesaid provisions of law. That as a result of said merger the assets of said Gennett Realty Company including said long-term leases became the property of plaintiff. That there passed to plaintiff as a result of said merger \$2.10 in cash and accounts receivable in the amount of \$24,006.42. That plaintiff became liable for debts of Gennett Realty Company as a result of said merger in the amount of \$1,588.59. That in its income and excess-profits tax return for the calendar year 1934 plaintiff did not report any gain or loss by reason of the mere acquisition of said leases and accounts receivable as the result of said merger. That plaintiff is informed and believes and on the basis of such information and belief alleges that the deficiency in income and excess-profits taxes and interest assessed against and collected from plaintiff, as aforesaid, for said calendar year 1934 was predicated upon the determination by the Commissioner of Internal Revenue that the acquisition by plaintiff of the assets of said Gennett Realty Company, as aforesaid, resulted in taxable gain realized by plaintiff in the amount of \$316,024.89. That [5] said taxable gain was arrived at by the Commissioner of In-

ternal Revenue by deducting from the value of the assets received by plaintiff on said merger consisting of \$2.10 in cash, said accounts receivable in the amount of \$24,006.42 and said long-term leases, one of which was valued by said Commissioner at \$39,720.61 and the other of which was valued by said Commissioner at \$366,884.35, the liabilities of Gennett Realty Company in the amount of \$1,588.59 and the cost to plaintiff of the stock of said Gennett Realty Company determined by the Commissioner to be \$113,000.00. That the Commissioner of Internal Revenue erred in determining that the acquisition of assets of Gennett Realty Company by plaintiff resulted in a gain taxable to plaintiff in said amounts in that (in substance said Gennett Realty Company had no separate existence from plaintiff and was merely the Agent or instrumentality of plaintiff and was not in fact an entity separate therefrom) and in that (the transaction by which plaintiff became the owner of the assets of said Gennett Realty Company was a merger as a result of which plaintiff realized, as the surviving corporation, no gain or loss) and in that in the alternative even (if there was a gain realized by plaintiff on the acquisition of said assets, as aforesaid, said gain was one resulting from an exchange taking place in connection with a reorganization which was not recognizable for federal income tax purposes under the provisions of Section 112 of the Revenue Act of 1934.)

VIII.

That on or about August 18, 1939 plaintiff caused to be made and filed with defendant its written claim for refund of income and excess profits taxes and interest assessed and collected against plaintiff, as aforesaid, for the calendar year 1934 in the [6] amount of \$73,557.08. That a true and correct copy of said claim for refund is attached hereto, marked Exhibit A, referred to and by this reference made a part hereof. That said claim for refund was based upon the same grounds and facts relied upon herein.

IX.

That on or about September 20, 1940 plaintiff's said claim for refund was disallowed by the Commissioner of Internal Revenue. That the letter of the Commissioner of Internal Revenue notifying plaintiff of the disallowance of its said claim for refund was dated September 20, 1940.

X.

That no part of said sum of \$73,557.08 assessed and collected from plaintiff as and for income and excess profits tax and interest, as aforesaid, has been refunded to plaintiff by defendant or any other person. That no action has been had in Congress upon said claim for refund or in any other department of the Government. That plaintiff is the sole owner of the claim here sued upon and that said sum of \$73,557.08 is due and owing from defendant to plaintiff, together with interest thereon at

the rate of six per cent per annum from the date of payment thereof.]

Wherefore plaintiff prays for judgment herein in the amount of \$73,557.08 together with interest thereon as provided by law, and for such other and further relief as may be deemed just in the premises.

CLAUDE I. PARKER, (HG)

JOHN B. MILLIKEN, (HG)

BAYLEY KOHLMEIER,

HARRIET GEARY,

Attorneys for Plaintiff,

808 Bank of America Building,

Los Angeles, California. [7]

State of California,

County of Los Angeles—ss.

Philip Johnson being first duly sworn, deposes and says: that he is an officer, to-wit, Secretary, of The Starr Piano Company, Pacific Division, plaintiff herein; that he has read the foregoing complaint and knows the contents thereof and that the same is true except as to the matters therein stated upon his information or belief and as to those he believes it to be true.

PHILIP JOHNSON.

Subscribed and sworn to before me a Notary Public this 19th day of March, 1941.

[Seal] M. LE SAGE,

Notary Public in and for the County of Los Angeles, State of California. [8]

EXHIBIT A

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps
Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,
County of Los Angeles—ss.

Type or Print

Name of taxpayer or purchaser of stamps, The
Starr Piano Company (Pacific Division).

Business address, 1344 South Flower Street, Los
Angeles, California.

The deponent, being duly sworn according to
law, deposes and says that this statement is made
on behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed,
6th District California.

2. Period (if for income tax, make separate

form for each taxable year) from Jan. 1, 1934, to Dec. 31, 1934.

3. Character of assessment or tax, Add'l Income and excess-profits taxes and interest.

4. Amount of assessment, \$73,557.08; dates of payment, March 3, 1938.

5. Date stamps were purchased from the Government

6. Amount to be refunded (or such greater amount as may be legally refundable), \$73,557.08.

7. Amount to be abated (not applicable to income or estate taxes)..... \$.....

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1938, on March 3, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

(Attach letter-size sheets if space is not sufficient)

(Signed) STARR PIANO COMPANY,

By ALICE L. GENNETT,

President.

Sworn to and subscribed before me this 16 day of August, 1939.

M. H. AHLSSKOG,

Notary Public.

(See Instructions on Reverse Side)

[Printer's Note: Reverse side of paper consisting of a ruled form not filled out.] [9]

Claimant is a corporation with its principal place of business at Los Angeles, California, and is engaged primarily in the business of selling pianos.

Prior to 1922 claimant acquired certain long term leases of real estate, located on South Hill Street, in the City of Los Angeles, and generally known as the Mackey lease and the Pelton lease.

During the year 1922 claimant caused the Gennett Realty Company, a corporation, to be organized under the laws of the State of California. The Gennett Realty Company was organized by claimant for the purpose of holding title to said Mackey Lease and said Pelton Lease. Immediately after the organization of said company claimant transferred said leases to it in exchange for all of the capital stock of the company, except three directors qualifying shares. The property covered by said leases was subleased to claimant by the Gennett Realty Company and thereafter claimant and Gennett Realty Company joined in a sublease to a third party. All of the stock of the Gennett Realty Company, except the directors qualifying shares, was owned at all times by claimant. The officers and directors of claimant were also officers and directors of the Gennett Realty Company. The Gennett Realty Company maintained no separate business offices or employees and its business affairs were conducted in the office of claimant by officers and employees of claimant. The affairs of the Gennett Realty Company were directed by claimant and that company was operated as a department of claimant.

In 1934 it was decided by claimant that there was no need for Gennett Realty Company to continue as a separate corporation and that Gennett Realty Company should be merged into claimant. On July 31, 1934 claimant and Gennett Realty Company entered into a [10] merger agreement, pursuant to and in accordance with Sections 361 to 362(c) inclusive of the Civil Code of the State of California, whereby said corporations were merged.

As a result of said merger, the assets of Gennett Realty Company, including said Mackey Lease and said Pelton Lease, vested in claimant.

There also passed to claimant, as a result of said merger, \$2.10 in cash and accounts receivable in the amount of \$24,006.42. Claimant assumed liabilities of the Gennett Realty Company in the amount of \$1,588.59.

On July 31, 1934 the fair market value of said Mackey Lease did not exceed the sum of \$39,720.61 and the fair market value of said Pelton Lease did not exceed the sum of \$366,884.35. The cost to claimant of the stock of the Gennett Realty Company was not less than \$113,000.00.

In its income tax return for the year 1934 claimant did not report any gain or loss by reason of the acquisition of said leases and accounts receivable as a result of said merger. Thereafter, the Commissioner of Internal Revenue determined that claimant realized a gain upon the acquisition of said leases and accounts receivable in the amount of \$316,024.89 and assessed a deficiency income tax

against claimant for the year 1934 in the amount of \$46,240.78 and a deficiency excess-profits tax for the year 1934 in the amount of \$16,222.19. Claimant paid said tax together with interest thereon in the amount of \$11,094.11, or a total sum of \$73,557.08, to the Collector of Internal Revenue at Los Angeles, California on the third day of March, 1938. Said income tax and said excess-profits tax were erroneously and illegally assessed and collected from claimant for the reasons—

1. No gain was realized by claimant upon the acquisition [11] of said leases upon the merger of Gennett Realty Company into claimant. In view of the ownership of all the stock of Gennett Realty Company by claimant, the close relationship between the companies and the actual conduct of Gennett Realty Company by claimant as a department or mere instrumentality of claimant, Gennett Realty Company was not in actual fact a separate entity from claimant and should not have been so regarded. For all practical purposes claimant owned the assets of Gennett Realty Company and the merger of Gennett Realty Company into claimant resulted merely in a change of form of that ownership and did not result in the realization of gain by claimant. See *Southern Pacific Company v. Lowe*, 247 U.S. 330.

2. The transaction in this case was a merger and no gain or loss is realized upon the acquisition of property of the merged corporation by the surviving corporation as the result of the merger.

3. If there was a realization of gain by claim-

ant that gain was one resulting from a reorganization which was not recognizable, for income tax purposes, under the provisions of Section 112 of the Revenue Act of 1934.

Wherefore, it is respectfully requested that the taxes and interest paid by claimant for the year 1934 in the amount of \$73,577.08, as aforesaid, be refunded.

CERTIFICATE

I hereby certify that the foregoing claim for refund was prepared by me for and on behalf of said taxpayer; that the facts recited in said protest are the exact facts as given to me by representatives of taxpayer, and to the best of my knowledge and belief are true and correct. [12]

Dated at Los Angeles, California, this 4th day of August, 1939.

BAYLEY KOHLMEIER,

With Claude I. Parker, 808
Bank of America Bldg., Los
Angeles, California.

[Endorsed]: Filed Mar. 20, 1941. [13]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof, except that defendant denies that the income and excess-profits tax therein referred to were erroneously and/or illegally assessed and/or collected.

IV.

Admits the allegations contained in paragraph IV thereof, but in that connection alleges:

That on April 15, 1935, an extension of time having been granted, the Starr Piano Company, Pacific Division, the taxpayer, filed its income and excess-profits tax return on Treasury Form 1120 for the calendar year 1934 showing a gross income of \$170,207.69 (line 14), total deductions of \$169,560.45 (line 26), a net income subject to normal tax of \$647.24 (line 27) and no net income subject to excess-profits tax (line 37). The said return contained an income tax computation showing total income tax [14] of \$89.00 (line 84) which was paid

together with interest of 11 cents in four installments during the year 1935.

V.

Admits the allegations contained in paragraph V thereof, except that defendant alleges that after the filing of said return and the payment by plaintiff of the tax reported therein, the Commissioner of Internal Revenue determined that the net income of the taxpayer for the calendar year 1934 subject to normal income tax was not \$647.24 as reported but \$336,943.35 and that its net income subject to excess-profits tax was therefore \$324,443.35. He determined that the normal income tax for the year 1934 was not \$89.00 as reported but was \$46,240.78 and that there was an excess-profits tax due for that year in the amount of \$16,222.19; and that the taxpayer waived its right to appeal to the Board of Tax Appeals from these determinations of the Commissioner and that official, on or about January 21, 1938, assessed against it the deficiency in tax aforesaid with interest of \$7,906.54 on the income tax deficiency and \$2,773.77 on the excess-profits tax deficiency, a total of \$73,143.28. On March 2, 1938, there was assessed additional interest of \$413.80 making a total deficiency to that date of \$73,557.08 which was paid on March 3, 1938.

VI.

Denies the allegations contained in paragraph VI thereof.

VII.

Denies the allegations contained in paragraph VII thereof.

VIII.

Admits that plaintiff filed its claim for refund at the time, in the amount and for the year, as alleged in paragraph VIII thereof. However, in that connection, defendant alleges that on August 18, 1939, the taxpayer filed with the Collector of Internal Revenue for the Sixth Internal Revenue District of California at Los Angeles, a claim for refund on Treasury Form 843 in the amount of \$73,557.08 relating to the calendar year 1934 and grounded its claim for refund upon the follow- [15] ing: (1) that no gain was realized by the taxpayer by the acquisition of leases upon the merger of Gennet Realty Company, (2) that if it was a merger no gain or loss was realized and (3) that if there was a realization of gain that said gain was one resulting from a reorganization which was not subject to taxation; and that the claim for refund was disallowed by the Commissioner and notice of disallowance was given to the plaintiff by letter dated September 20, 1940.

IX.

Admits the allegations contained in paragraph IX thereof, except that defendant denies said allegations to the extent that they do not agree with the foregoing affirmative allegations contained in paragraph VIII of this Answer.

X.

Admits the allegations contained in paragraph X

thereof, except that defendant denies that any part of the sum therein referred to is due and/or owing from defendant to plaintiff. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is the sole, or other, owner of the claim sued upon by it.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States At-
torney

ARMOND MONROE JEWELL

Assistant United States At-
torney

EUGENE HARPOLE

Special Attorney, Bureau of
Internal Revenue

By E. H. MITCHELL

Attorneys for defendant

[Endorsed]: Filed June 20, 1941. [16]

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties hereto through their respective counsel of record hereby stipulate and agree that in addition to the facts admitted by the pleadings, the

following facts are true and may be found as facts by the court:

I.

That on the 1st day of February, 1921, plaintiff, as lessee, entered into a ninety-nine year lease covering the property situated in the City of Los Angeles, County of Los Angeles, State of California, described as

Lots 19 and 20 in Block 18 of Ord's Survey, as per map recorded in Book 34, at page 89 of Miscellaneous Records in the office of the County Recorder of Los Angeles County, California, with Clara Howes Mackey, as lessor. This lease was commonly known as the Mackey Lease. That on the 1st day of March, 1921, plaintiff, as lessee, entered into a ninety-nine year lease covering the property situated in the City of Los Angeles, County of Los Angeles, State of California, described as

Lot 18 in Block 18 of Ord's Survey, as per map recorded in Book 34, at page 89 of Miscellaneous Records in the office of the County Recorder of Los Angeles County, California, with Arthur N. Pelton, as lessor. This lease was commonly known as the Pelton Lease. [17]

II.

During the month of May, 1922, plaintiff caused the Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California. The Gennett Realty Company was caused

to be organized by plaintiff for the purpose of holding legal title to the said Mackey and the said Pelton leases. On the 17th day of July, 1922, plaintiff transferred all of its right, title and interest in and to the said Mackey Lease and the said Pelton Lease to the Gennett Realty Company in exchange for all of the capital stock of the said Gennett Realty Company, to wit: one thousand shares of common stock. Three shares of the said one thousand shares of common stock were nominally held by three individuals as directors' qualifying shares. At all times during the existence of the Gennett Realty Company plaintiff owned all of the outstanding and issued stock of said corporation. On the 1st day of August, 1922, Gennett Realty Company, as lessor, and plaintiff, as lessee, entered into a sublease of the property covered by the said Mackey and Pelton leases. This sublease was for a term of fifteen years. During the year 1922 Gennett Realty Company issued its bonds in the amount of \$200,000.00 for the purpose of raising funds to construct a building on the property covered by the said Pelton Lease. Said funds were raised and a building was actually constructed on the property covered by the said Pelton Lease. On the 1st day of July, 1923, Gennett Realty Company and plaintiff, as lessors, entered into a sublease with Bullock's, a California corporation, as lessee, of the property covered by the Pelton Lease. The term of said sublease was for a period of twenty-five years commencing with the 1st day of July, 1923 and ending on the 30th day of June, 1948. On the

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See R2

1st day of May, 1924 the term of the said sublease agreement of the 1st of July, 1923 was extended until the 30th day of April, 1984. On the 1st day of May, 1924, [18] Gennett Realty Company and plaintiff, as lessors, entered into a sublease with Bullock's, a California corporation, as lessee of the property covered by the Mackey Lease. The term of said sublease was for a period of sixty years commencing with the 1st day of May, 1924 and ended on the 30th day of April, 1984.

III.

That during the term of the existence of the Gennett Realty Company, the members of the Board of Directors and the officers of said company were persons employed by plaintiff and were actively engaged in the activities carried on by plaintiff. Said Gennett Realty Company had no office separate and apart from plaintiff. Said Gennett Realty Company had no assets except the leases hereinabove mentioned. Said Gennett Realty Company did not have a bank account. Said Gennett Realty Company had no employees other than its officers and directors. All bookkeeping of the Gennett Realty Company was done by an employee of plaintiff. All indebtedness of the Gennett Realty Company was paid by check of the plaintiff, and plaintiff was credited on its account with Gennett Realty Company for said payments. All rentals accruing under said subleases to the Gennett Realty Company were collected by the Security-First National Bank of Los Angeles in a trustee account

on behalf of said Gennett Realty Company. The Security-First National Bank, as such trustee, provided for the retirement of the bonds of said Gennett Realty Company. Said trustee further provided for the payment of all interest on said bonds and taxes due on the leased properties. For the years 1922, 1923 and 1924 plaintiff and Gennett Realty Company filed separate corporate income tax returns. At all other times during its existence, with the exception for the year 1934, the year in which said Gennett Realty Company was merged into plaintiff, Gennett Realty Company and plaintiff filed consolidated corporate income and franchise tax returns. During the year 1934 plaintiff [19] transferred certain accounts to Gennett Realty Company to be collected in the name of Gennett Realty Company. Part of said accounts were collected in the name of Gennett Realty Company. The uncollected accounts were transferred back to plaintiff by Gennett Realty Company. That during the term of its existence the Gennett Realty Company carried on no activities except as set forth in this stipulation of facts.

IV.

That during July and August, 1934, the Gennett Realty Company merged into plaintiff. Said merger was made in compliance with the provisions of Division First, Part IV, Title I, Chapter XIII of the Civil Code of California. That a true and correct copy of the merger agreement whereby Gennett Realty Company was merged into plaintiff is at-

tached hereto, designated "Exhibit A" and hereby made a part hereof. That said merger agreement was approved by the Board of Directors of Gennett Realty Company, the shareholders of Gennett Realty Company, the Board of Directors of plaintiff, and all the shareholders of plaintiff on the 31st day of July, 1934. The certificate of the President and Secretary of plaintiff setting forth the time and place of the special meeting of the Board of Directors of plaintiff in which the said merger agreement was approved, a copy of the resolution approving said merger agreement adopted at said meeting, the vote in favor of the resolution, the time and place of the meeting of the shareholders of plaintiff at which the said merger agreement was approved, the vote by which said merger agreement was approved, the number and class of the outstanding shares of plaintiff and a statement of the mailing of the notice of the time, place and purpose of the said meeting of said shareholders, was executed by Fred Gennett, president of plaintiff, and Harry L. Nolder, secretary of plaintiff, on the 31st day of July, 1934. A true and correct copy of said certif- [20] icate is attached hereto, designated "Exhibit B" and hereby made a part hereof. Said certificate was filed with the Secretary of State of the State of California in Sacramento, California, on the 1st day of August, 1934. A copy of said certificate certified by the Secretary of State of the State of California was filed with the County Clerk of the County of Los Angeles, State of California, the county in which plaintiff had its principal place

of business, on the 10th day of August, 1934. The certificate of Fred Gennett, President, and Philip Johnson, Secretary, of Gennett Realty Company setting forth the time and place of the special meeting of the Board of Directors of Gennett Realty Company in which the said merger agreement was approved, a copy of the resolution approving said merger agreement adopted at said meeting, the vote in favor of the resolution, the time and place of the meeting of the shareholders of Gennett Realty Company at which the said merger agreement was approved, the vote by which said merger agreement was approved, the number and class of the outstanding shares of plaintiff and a statement of the mailing of the notice of the time, place and purpose of the said meeting of said shareholders, was executed by Fred Gennett, President of Gennett Realty Company, and Philip Johnson, Secretary of Gennett Realty Company, on the 31st day of July, 1934. A true and correct copy of said certificate is attached hereto, designated "Exhibit C" and hereby made a part hereof. Said certificate was filed with the Secretary of State of the State of California in Sacramento, California, on the 1st day of August, 1934. A copy of said certificate certified by the Secretary of State of the State of California was filed with the County Clerk of the County of Los Angeles, State of California, the county in which Gennett Realty Company had its principal place of business, on the 10th day of August, 1934. [21]

VI.

That the deficiency in Federal income and excess profit taxes paid by plaintiff on March 3, 1938 was occasioned solely by the Commissioner of Internal Revenue's determination that gain or loss was recognizable for Federal income and excess profit tax purposes upon receipt by plaintiff of property as a result of the merger of Gennett Realty Company into plaintiff. That if plaintiff is correct in its position [that the property received by it as a result of the merger of Gennett Realty Company into plaintiff is not in any part a receipt of income taxable for Federal income and excess profit tax purposes for the calendar year 1934, plaintiff is entitled to recover as prayed for in the complaint herein. That if the Commissioner of Internal Revenue was correct in his position that gain or loss was recognizable for Federal income and excess profit tax purposes upon the receipt of property by plaintiff as a result of the said merger of Gennett Realty Company into plaintiff, the said deficiency was correctly computed by the Commissioner of Internal Revenue and plaintiff is not entitled to recovery in this action.

Dated: January 5, 1942.

CLAUDE I. PARKER (STB)
JOHN B. MILLIKEN (STB)
BAYLEY KOHLMEIER (STB)
STUART T. BARON

Attorneys for Plaintiff

808 Bank of America Building,
Los Angeles, California

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States At-
torney

ARMOND MONROE JEWELL

Assistant United States At-
torney

By ARMOND MONROE JEWELL

Attorneys for Defendant [22]

EXHIBIT A

MERGER AGREEMENT

This Agreement made this 31st day of July, 1934 by and between The Starr Piano Company (Richmond, Indiana), Pacific Division, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter called "The Piano Company", and Gennett Realty Company, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter called "The Realty Company," Witnesseth:

Whereas, The Piano Company owns all of the issued and outstanding shares of the capital stock of The Realty Company, with the exception of three shares owned by its directors, and the said companies have agreed to reorganize and to carry out such reorganization by means of a statutory merger or consolidation under and in accordance with the

provisions of Sections 361 to 362-c inclusive of the Civil Code of the State of California, and deem it to be to their best interests and to the best interests of their respective shareholders to merge The Realty Company into The Piano Company, to the end that The Piano Company shall, after such merger, be and become the surviving corporation, as provided in Section 361 of said Civil Code, and

Whereas, there are now issued and outstanding one hundred (100) shares of the common capital stock of The Piano Company of the par value of One Hundred Dollars (\$100.) per share, being the entire number of authorized shares of said The Piano Company, and such shares are held by seven individual stockholders, the names of such stockholders and the number of shares held by each being as follows, to-wit: [23]

Name	No. of Shares
Clarence Gennett	14
Alice L. Gennett	14
Rose Gennett Martin	14
Fred Gennett	13
Harry Gennett	14
Harry L. Nolder	29
Georgia A. Nolder	1
Philip Johnson	1

and

Whereas, there are now issued and outstanding one hundred (100) shares of the capital stock of The Realty Company, the same being the entire number of authorized shares of said corporation, the names of the shareholders thereof and the num-

ber of shares held by each being as follows, to-wit:

Name	No. of Shares
The Starr Piano Company (Richmond, Indiana), Pacific Division	97
Harry L. Nolder	1
Fred Gennett	1
Philip Johnson	1

Now, Therefore, in consideration of the premises, it is hereby agreed as follows:

First: The Starr Piano Company (Richmond, Indiana) Pacific Division and Gennett Realty Company shall merge, and the same hereby do so merge into The Starr Piano Company (Richmond, Indiana), Pacific Division, and said The Starr Piano Company (Richmond, Indiana), Pacific Division, shall be and the same hereby is the surviving corporation resulting from such merger.

Second: All of the assets of Gennett Realty Company of every kind or nature, both real and personal, wheresoever situated, shall ipso facto, by virtue of this merger agreement, be and become vested in The Starr Piano Company (Richmond, Indiana), Pacific Division. Included in the said assets of Gennett Realty Company are the following leasehold estates: [24]

1. The leasehold created by that certain lease dated February 1, 1921, wherein Clara Howes Mackey is lessor and The Starr Piano Company (Richmond, Indiana), Pacific Division, a California corporation, is lessee, which said

lease is recorded in Book 984, at page 232, of Leases, in the office of the County Recorder of Los Angeles County, California, and which covers that certain real estate situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lots 19 and 20 in Block 18 of Ord's Survey, as per Map recorded in Book 34, at page 89, of Miscellaneous Records of said Los Angeles County, and which is for the term of *niney-nine* (99) years, beginning on said first day of February, 1921, and ending on the thirty-first day of January, 2020; and which Lease was assigned by said The Starr Piano Company (Richmond, Indiana), Pacific Division, to Gennett Realty Company on the 17th day of July, 1922.

2. The leasehold created by that certain lease dated March 1, 1921, wherein Arthur M. Pelton is lessor and The Starr Piano Company (Richmond, Indiana), Pacific Division, is lessee, which said lease is recorded in Book 142, at page 228, of Leases, in the office of the County Recorder of Los Angeles County, California, and which covers that certain real estate situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 18, in Block 18 of Ord's Survey, as per Map recorded in Book 34, at page 89, of Miscellaneous Records of said Los Angeles County, and which lease is for the term of ninety-nine (99) years, beginning on the first day of March, 1921, and ending on the thirtieth

day of April, 2020; and which lease was assigned by The Starr Piano Company (Richmond, Indiana), Pacific Division, to Gennett Realty Company on the 17th day of July, 1922.

Third: The Starr Piano Company (Richmond, Indiana), Pacific Division, shall, and does hereby agree so to do, assume and pay all of the debts, liabilities and obligations of every kind or nature of Gennett Realty Company.

Fourth: All shares of the Capital stock of Gennett Realty Company now outstanding shall ipso facto by virtue of this agreement be surrendered and cancelled and the holders thereof shall surrender the respective shares held by them to the Secretary of The Starr Piano Company (Richmond, Indiana), Pacific Division, for cancellation on or before the first day of August, 1934. The shares of The Starr Piano Company (Richmond, Indiana), Pacific Division, now outstanding, as aforesaid, shall be unaffected by this agreement, but the owners of [25] said shares and the respective number of shares held by each shall continue as above set out.

Fifth: All of the assets of Gennett Realty Company shall be merged into and acquired by The Starr Piano Company (Richmond, Indiana), Pacific Division, as of the first day of August, 1934, and the liabilities of Gennett Realty Company shall be assumed by The Starr Piano Company (Richmond, Indiana), Pacific Division, in the respective amounts thereof existing on said date. All surplus, whether earned surplus or paid in surplus, and all

unrealized profits of Gennett Realty Company shall be added to the earned surplus, paid in surplus and unrealized profits respectively of The Starr Piano Company (Richmond, Indiana), Pacific Division, and shall be set up on the books of the latter as an increase in the earned surplus, paid in surplus and unrealized profits respectively of The Starr Piano Company (Richmond, Indiana), Pacific Division, and may be thereafter dealt with as such in the declaration of dividends by The Starr Piano Company (Richmond, Indiana), Pacific Division, or otherwise. All other items of assets of Gennett Realty Company, after deducting therefrom the said sums of earned surplus, paid in surplus and unrealized profits, shall be added to the capital of The Starr Piano Company (Richmond, Indiana), Pacific Division.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective presidents or vice-presidents and secretaries or assistant secretaries and caused their respective seals to be affixed hereto this 31st day of July, 1934.

THE STARR PIANO
COMPANY
(RICHMOND, INDIANA),
PACIFIC DIVISION.

[Seal] By FRED GENNETT
President
By HARRY L. NOLDER
Secretary

GENNETT REALTY
COMPANY,

[Seal] By FRED GENNETT

President

By PHILIP JOHNSON

Secretary [26]

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1934, before me, Mary S. Alexander, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Fred Gennett, known to me to be the President, and Harry L. Nolder, known to me to be the Secretary of The Starr Piano Company (Richmond, Indiana), Pacific Division, the corporation which executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARY S. ALEXANDER

Notary Public in and for said County and State.

[27]

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1934, before me, Mary S. Alexander, a Notary Public in and for said

County and State, residing therein, duly commissioned and sworn, personally appeared Fred Gennett known to me to be the President, and Philip Johnson, known to me to be the Secretary of Gennet Realty Company, the corporation which executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARY S. ALEXANDER
Notary Public in and for said County and State.

[28]

EXHIBIT B
CERTIFICATE
of

THE STARR PIANO COMPANY (RICHMOND, INDIANA), PACIFIC DIVISION.

The Undersigned, Fred Gennett and Harry L. Nolder, do hereby certify that they are and have been at all times herein mentioned the duly elected and acting President and Secretary, respectively, of The Starr Piano Company (Richmond, Indiana), Pacific Division, a California corporation, and do further hereby certify:

(a) That a special meeting of the Board of Directors of said corporation was duly and regu-

larly held on July 31st, 1934, at the office of the corporation, 1344 South Flower Street, Los Angeles, California, at which meeting there was at all times present and acting more than a quorum of said board, to-wit, four of the five members thereof;

(b) That at said meeting the following resolution was duly adopted:

Resolved, that the form of Merger Agreement between this company and Gennett Realty Company, as presented at this meeting, be and the same is hereby approved.

Be it further resolved, that when said agreement shall have been approved by the stockholders of the company, in accordance with the provisions of Section 361 of the Civil Code of the State of California, that the President or Vice-President and Secretary or Assistant Secretary of the company be and they are hereby authorized and directed to execute said agreement on behalf of this company and to execute the certificate covering proceedings for merger as set forth in said Section 361 of the Civil Code of California, and to file said agreement and certificate with the Secretary of State of the State of California, and to do such other acts and to file such other documents and papers as they may deem advisable or necessary to complete the merger of this company with Gennett Realty Company in accordance with the terms of said merger agreement and the provisions of Section 361 of the Civil Code of California.

(c) That the vote in favor of said resolution was 4; [29]

(d) That a special meeting of all of the shareholders of said corporation was duly held at ten o'clock A. M., on July 31, 1934, at the principal office of said corporation, located at 1344 South Flower Street, Los Angeles, California; that at said meeting said resolution of the Board of Directors was approved by the vote of 100 shares of the capital stock of said corporation, constituting the vote of the holders of not less than two-thirds of the issued and outstanding shares of said corporations;

(e) That the total number of outstanding shares of said corporation is one hundred (100) shares, and all of said shares are common shares;

(f) The mailing of the notice of the time, place and purpose of said shareholders' meeting was duly given in accordance with the provisions of Section 361 of the Civil Code of the State of California.

In Witness Whereof, the undersigned have executed this Certificate this 31st day of July, 1934.

FRED GENNETT

President of The Starr Piano
Company (Richmond, Indiana),
Pacific Division.

HARRY L. NOLDER

Secretary of The Starr Piano
Company (Richmond, Indiana),
Pacific Division.

State of California

County of Los Angeles.—ss.

Fred Gennett and Harry L. Nolder, being first duly sworn, each for himself deposes and says:

That Fred Gennett is and was at all the times mentioned in the foregoing Certificate, the President of The Starr Piano [30] Company (Richmond, Indiana), Pacific Division, the California corporation therein mentioned, and Harry L. Nolder is and was at all of said times the Secretary of said corporation; and each has read said Certificate and that the statements therein made are true of his own knowledge, and that the signatures purporting to be the signatures of said President and Secretary thereto, are the genuine signatures of said President and Secretary, respectively.

FRED GENNETT

HARRY L. NOLDER

Subscribed and sworn to before me this 31st day of July, 1934.

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles, State of California. [31]

EXHIBIT C

CERTIFICATE OF
GENNETT REALTY COMPANY.

The Undersigned, Fred Gennett and Philip Johnson, do hereby certify that they are and have

been at all times herein mentioned the duly elected and acting President and Secretary, respectively, of Gemnett Realty Company, a California corporation, and do further hereby certify:

(a) That a special meeting of the Board of Directors of said corporation was duly and regularly held on July 31st, 1934, at the office of the corporation, 1344 South Flower Street, Los Angeles, California, at which meeting there was at all times present and acting more than a quorum of said board, to-wit: Three of the three members thereof;

(b) That at said meeting the following resolution was duly adopted:

Resolved, that the form of Merger Agreement between this Company and The Starr Piano Company (Richmond, Indiana), Pacific Division, as presented at this meeting, be and the same is hereby approved.

Be It Further Resolved, that when said agreement shall have been approved by the stockholders of the company in accordance with the provisions of Section 361 of the Civil Code of the State of California, that the President or Vice-President and Secretary or Assistant Secretary of the company be and they are hereby authorized and directed to execute said agreement on behalf of this company and to execute the certificate covering proceedings for merger as set forth in said Section 361 of the Civil Code of California, and to file said agreement and certificate with the Secretary of State of the State of California, and to do such

other acts and to file such other documents and papers as they may deem advisable or necessary to complete the merger of this company with The Starr Piano Company (Richmond, Indiana), Pacific Division, in accordance with the terms of said Merger Agreement and the provisions of Section 361 of the Civil Code of California.

(c) That the vote in favor of said resolution was 3; [32]

(d) That a special meeting of all of the shareholders of said corporation was duly held at 10:00 o'clock A. M. on July 31st, 1934, at the principal office of said corporation, located at 1344 South Flower Street, Los Angeles, California; that at said meeting said resolution of the board of directors was approved by the vote of 100 shares of the capital stock of said corporation, constituting the vote of the holders of not less than two-thirds of the issued and outstanding shares of said corporation;

(e) That the total number of outstanding shares of said corporation is one hundred (100) shares, and all of said shares are common shares;

(f) The mailing of the notice of time, place and purpose of said shareholders' meeting was duly given in accordance with the provisions of Section 361 of the Civil Code of the State of California.

In Witness Whereof, the undersigned have executed this Certificate this 31st day of July, 1934.

FRED GENNETT

President of Gennett Realty
Company.

PHILIP JOHNSON

Secretary of Gennett Realty
Company.

State of California

County of Los Angeles—ss.

Fred Gennett and Philip Johnson, being first duly sworn, each for himself deposes and says:

That Fred Gennett is, and was at all the times mentioned [33] in the foregoing Certificate, the President of Gennett Realty Company, the California Corporation therein mentioned, and Philip Johnson is, and was at all of said times, the Secretary of said corporation; and each has read said Certificate and that the statements therein made are true of his own knowledge, and that the signatures purporting to be the signatures of said President and Secretary thereto are the genuine signatures of said President and Secretary, respectively.

FRED GENNETT

PHILIP JOHNSON

Subscribed and sworn to before me this 31st day of July, 1934.

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 5, 1942. [34]

[Title of District Court and Cause.]

MINUTE ORDER AND MEMORANDUM
DECISION

The above-entitled cause heretofore submitted for decision on a stipulation of facts and briefs is now decided as follows:

The court, having considered the facts in the stipulation of the parties hereto and the briefs of counsel, including the letter of the attorney for the defendant dated August 19, 1942 and the letter of the attorneys for the plaintiff dated September 15, 1942, and the opinions attached to said letters, now finds in favor of the plaintiff and orders that plaintiff do have and recover of the defendant the sum of \$73,557.08, together with interest thereon as provided by law and as prayed for in said complaint.

The court is of the view that by reason of the actions of the plaintiff, The Starr Piano Company, Pacific Division, a corporation, and its wholly owned subsidiary, The Gennett Realty Company, a California corporation, set forth in the merger agreement of July 31, 1934, and the certificates of the same date, there occurred a statutory merger under the provisions of Sections 361-361(a) of the Civil Code of the State of California. This merger was a reorganization under Section 112(g)(1) of the Revenue Act of 1934. As the plaintiff corporation already owned the entire capital stock of the Gennett Corporation, it was not necessary that the property of the subsidiary, title to which automatically vested in the plaintiff upon merger, should

be [35] exchanged for stock in the parent corporation. The stock of the subsidiary corporation was surrendered and cancelled upon merger. Under the circumstances, the plaintiff is entitled to the full benefit of the provisions of Section 112(b)(4) of the Revenue Act of 1934 to the effect that no gain or loss accrues upon a statutory reorganization.

The court is also of the view that the facts in the case warrant us in disregarding entirely the entity of the Gennett Realty Company. It had no substantial separate existence apart from the parent corporation. Its sole object was to hold legal title to certain leaseholds. During its entire existence with the exception of a period of 1922, 1923, 1924, and the year of the merger, 1934, the subsidiary and the plaintiff filed consolidated corporate income and franchise tax returns. For this reason we do not believe that the parent corporation should be charged with any gain on the acquisition of the assets of the subsidiary through the statutory merger.

The cause having been submitted entirely on stipulated facts, the said stipulated facts may stand for the findings of the court, no other findings being necessary. Counsel for the plaintiff, however, are required to prepare formal judgment in conformity with Local Rule 8.

Dated this 26th day of September, 1942.

Counsel notified.

[Endorsed]: Filed Sept. 26, 1942. [36]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause came on regularly for trial before the Honorable Judge, Leon R. Yankwich, presiding without a jury; plaintiff appearing by its attorneys, Claude I. Parker and John B. Milliken, and defendant appearing by his attorneys, E. H. Mitchell, Assistant United States Attorney, and Edward J. O'Connor, Assistant United States Attorney.

Written stipulation of facts was filed and the cause submitted for decision. The Court adopts the written stipulation of facts and its findings of fact and makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the merger of the plaintiff, The Starr Piano Company, Pacific Division, and The Gennett Realty Company, was a statutory merger and a reorganization within the provision of Sec. 112(g)(1) of the Revenue Act of 1934. [37]

2. That the acquisition of the assets of The Gennett Realty Company by plaintiff, The Starr Piano Company, was a transaction within the scope of Sec. 112(b)(4) of the Revenue Act of 1934 and was one in connection with which no gain or loss was recognized for income tax purposes.

3. That plaintiff, The Starr Piano Company, and The Gennett Realty Company were so closely related in control, management and operation that

the separate entity of The Gennett Realty Company should be disregarded.

4. That no gain or loss was realized by plaintiff, The Starr Piano Company, upon the acquisition by it of the assets of The Gennett Realty Company as the result of the merger of said corporations during the year 1934.

5. That income and excess profits taxes and interest thereon for the year 1934 in the total amount of Seventy-Three Thousand Five Hundred Fifty-Seven and 08/100 Dollars (\$73,557.08) were erroneously assessed and collected from plaintiff by defendant and should be refunded.

6. That plaintiff is entitled to judgment against defendant in the sum of Seventy-Three Thousand Five Hundred Fifty-Seven and 08/100 Dollars (\$73,557.08) together with interest thereon at the rate of six per cent (6%) per annum from March 3, 1938, as provided by law, and its costs and disbursements in this action expended.

Dated at Los Angeles, California, this 3rd day of October, 1942.

LEON R. YANKWICH

Judge of the United States
District Court.

Approved as to form as provided in Rule 8. October 1, 1942.

EDWARD J. O'CONNOR

Attorney for Defendant.

[Endorsed]: Filed Oct. 3, 1942. [38]

In the District Court of the United States, Southern
District of California, Central Division

No. 1459-Y Civil

THE STARR PIANO COMPANY,
Plaintiff,

vs.

NAT ROGAN,
Defendant.

JUDGMENT

Hon. Leon R. Yankwich, District Judge.

The above-entitled cause came on regularly for trial before the Honorable Leon R. Yankwich, presiding without a jury; plaintiff appearing by its attorneys, Claude I. Parker and John B. Milliken, and defendant appearing by his attorneys, E. H. Mitchell, Assistant United States Attorney, and Edward J. O'Connor, Assistant United States Attorney.

Written stipulation of facts having been filed and the cause submitted for decision.

Wherefore, by reason of law and the facts herein, it is Ordered, Adjudged and Decreed that the plaintiff have and recover of defendant the sum of Seventy-three Thousand Five Hundred Fifty-seven and 08/100 Dollars (\$73,557.08), together with interest thereon at the rate of six per cent (6%) per annum from March 3, 1938, as provided by law, together with plaintiff's costs and disbursements in this action expended in [39] the amount of \$28.45.

Dated at Los Angeles, California, this 3rd day of October, 1942.

LEON R. YANKWICH

Judge of the United States
District Court.

Approved as to form as provided in Rule 8.

EDWARD J. O'CONNOR

Attorney for Defendant.

Judgment entered Oct. 3, 1942, Docketed Oct. 3, 1942, C. O. Book 11, Page 531. Edmund L. Smith, Clerk; Louis J. Somers, Deputy.

[Endorsed]: Filed Oct. 3, 1942. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nat Rogan, defendant in the above entitled case, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in the above entitled case on October 3, 1942, which is in favor of the plaintiff and against the defendant herein, for the sum of \$73,557.08, plus interest, from March 3, 1938.

LEO V. SILVERSTEIN,

United States Attorney.

By EDWARD J. O'CONNOR,

Assistant United States

Attorney,

Attorneys for Defendant.

Mailed copy to Claude I. Parker, Atty. for Plf.
12-31-42. T. H.

[Endorsed]: Filed Dec. 31, 1942. [41]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Defendant and appellant requests that the complete record and all the proceedings and evidence in the above-entitled action be incorporated in the record on appeal, including the following:

1. Plaintiff's complaint, together with exhibits thereto attached.
2. Defendant's answer.
3. Stipulation of facts.
4. The trial Court's minute order of September 26, 1942, ordering findings and conclusions of law in favor of the plaintiff.
5. Findings of fact and conclusions of law, dated and filed October 3, 1942.
6. Judgment dated and entered October 3, 1942.
7. Notice of appeal by defendant, dated and filed December 31, 1942. [42]
8. Order, dated February 8, 1943, extending time to docket cause on appeal to and including the 20th day of February, 1943.
9. This designation of portions of the record to be contained in the record on appeal.

Dated February 12, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States At-
torney.

EDWARD J. O'CONNOR,
Assistant United States At-
torney.

By EDWARD J. O'CONNOR,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed Feb. 12, 1943. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Helen L. Cure, being first duly sworn, deposes and says:

That (s)he is a citizen of the United States and a resident of Los Angeles County, California; that (his) (her) business address is 600 Federal Building, Los Angeles, California; that (s)he is over the age of eighteen years, and not a party to the above-entitled action;

That on February 12, 1943, (s)he deposited in the United States Mails in the Post Office at Tem-

ple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Defendant's Designation of Contents of Record on Appeal in the above-entitled action, addressed to Claude I. Parker, Esq., 808 Bank of America Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

(s) HELEN L. CURE,

Subscribed and Sworn to before me, this 12th day of February, 1943.

EDMUND L. SMITH,

Clerk, U. S. District Court,
Southern District of California.

[Seal] By GROVER C. GATES,
Deputy. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 20th day of February, 1943.

Dated this 8th day of February, 1943.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed Feb. 8, 1943. [45]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 1st day of March, 1943.

Dated this 19th day of February, 1943.

J. F. T. O'CONNOR,

United States District Judge.

[Endorsed]: Filed Feb. 20, 1943. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive contain full,

true and correct copies of Complaint for the Recovery of Income and Excess Profits Taxes Illegally Assessed and Collected; Answer; Stipulation of Facts; Minute Order and Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Defendant's Designation of Contents of Record on Appeal and Two Orders Extending Time to Docket Appeal which constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 26th day of February, A. D. 1943.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: No. 10379. United States Circuit Court of Appeals for the Ninth Circuit. Nat Rogan, Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, Appellant, vs. The Starr Piano Company, Pacific Division, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: February 27, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10379

NAT ROGAN, Collector of Internal Revenue,
Appellant,

vs.

THE STARR PIANO COMPANY,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The issues involved in this case are:

(1st) Whether the transaction involved herein was a reorganization, as defined by Section 112(g) (1)(2) and, hence, the gain exempt from recognition within the exemption provided in Section 112 (b)(4) of the Act.

(2nd) Whether the corporate entity of the Gennett Realty Company should be ignored.

(3d) Whether the transaction involved herein was a liquidation of the Gennett Realty Company, and the difference between the cost of the stock and the property of the company received represents taxable gain within the provisions of Section 115 (c) of the Revenue Act of 1934.

Appellant's contentions are: The appellant, Nat Rogan, hereby states that in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered against him in the above-entitled case on October

3, 1942, for \$73,557.08, plus interest from March 3, 1937, he intends to rely upon the following points:

I.

The trial court erred in concluding that plaintiff was entitled to recover said sum of \$73,557.08, plus interest.

II.

The trial court erroneously found and concluded that the plaintiff recognized no taxable gain in the year 1934 through the liquidation of plaintiff's wholly owned subsidiary, Gennett Realty Company, in the year 1934.

III.

The evidence introduced in the trial court showed that taxable gain was realized by plaintiff through said liquidation; that the Commissioner of Internal Revenue correctly determined that said gain was taxable income to plaintiff in 1934; and that the inclusion of said sum of taxable income for the year 1934 made plaintiff liable for payment of the income and excess profits taxes which were paid by plaintiff and which plaintiff sought to recover in this action.

IV.

The trial court erred in entering judgment for the plaintiff and in failing to enter judgment for the defendant herein.

Appellant states that the entire record is necessary for the proper consideration of the points relied upon, but that the parts of the record especially necessary for consideration are pages 17 to

32 of said record, on which the stipulation of facts which constituted all of the evidence of the case is set forth.

Dated: February 27, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States At-
torney.

EDWARD J. O'CONNOR,
Assistant United States At-
torney.

By EDWARD J. O'CONNOR,
Attorneys for Appellant.

[Endorsed]: Filed March 1, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED NECESSARY FOR CONSIDERA-
TION ON APPEAL.

Pursuant to Rule 19-6 of this Court, appellant designates the parts of the Record which he thinks necessary for the consideration of the points listed in his Statement of Points on which he intends to rely, filed concurrently herewith, and the parts which he desires to have printed, to wit:

Documents	Pages of Certified Record
1. Name and address of attorneys.....	1
2. Complaint, including exhibit attached.....	2
3. Answer	14
4. Minute Order and Memorandum Decision	35
5. Findings of Fact and Conclusions of Law	37
6. Judgment	39
7. Notice of Appeal.....	41
8. Order extending time to docket appeal.....	45, 46
9. Designation of the contents of record on appeal	42
10. Stipulation of Facts, with Exhibits A, B, and C	17, 23, 29, 32
11. Statement of Points on which appellant intends to rely	
12. This Designation	

Dated: February 27, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
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By EDWARD J. O'CONNOR,
Attorneys for Appellant.

[Endorsed]: Filed Mar. 1, 1943. Paul P. O'Brien,
Clerk.

